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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of the Commission's Rules to)
Permit Flexible Service Offerings in the)
Commercial Mobile Radio Services)

WT Docket No. 96-6

REPLY COMMENTS OF
VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits its reply comments on the above-captioned rulemaking proceeding.^{1/} Vanguard supports those commenters that urge the Commission to assert its jurisdiction over all commercial mobile radio services ("CMRS") under Section 332(c)(3).^{2/} Congress gave the Commission complete authority over the substantive aspects of CMRS regulation in the 1993 Budget Act and did nothing in the 1996 Act to circumscribe this authority in any way.^{3/} The Commission's failure thus far to define the scope of its authority does not prevent the Commission from asserting the

^{1/} See *First Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-6, FCC 96-283 (released August 1, 1996) (the "Notice"). Vanguard is a long-time provider of cellular service, and currently serves approximately 500,000 customers. Vanguard entered the cellular marketplace in 1984 and now is one of the 20 largest cellular carriers in the country. Vanguard's cellular systems serve 29 markets in the eastern half of the United States and cover a geographic area containing more than 7.8 million people.

^{2/} 47 U.S.C. § 332(c)(3).

^{3/} See Omnibus Budget Reconciliation Act of 1993, Pub.L.No. 103-66, 107 Stat. 312, 392 ("1993 Budget Act"); Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 ("1996 Act"). In the 1993 Budget Act Congress removed state jurisdiction over CMRS rates and entry, but allowed the states to regulate "other terms and conditions" of CMRS service. Congress intended, however, that "other terms and conditions" be construed narrowly to include only aspects such as customer service.

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role Congress intended. The Commission, not the states, have substantive jurisdiction over fixed, mobile and mixed CMRS, and the parties that argue to the contrary have an argument with a statute passed by Congress, not with the Commission.

The Commission also should reject continued incumbent local exchange carrier ("LEC") and state regulatory authority attempts to improperly impose incumbent LEC regulation on CMRS providers in the name of entirely mischaracterized "regulatory parity." As soon as a CMRS provider obtains equivalent market power with the incumbent LEC — that is CMRS becomes a replacement for landline service in a substantial portion of a state — a state can request authority to regulate that provider as a LEC under Section 332(c)(3)(A). Until then, there is no public interest benefit in imposing state substantive regulation on CMRS providers because, as Congress already determined, a competitive marketplace will protect the consumer interest far better than burdensome and potentially inconsistent state regulatory regimes.

I. SECTION 332(c)(3) GIVES THE FCC EXCLUSIVE JURISDICTION OVER ALL CMRS.

Section 332 gives the Commission complete authority to define the term "commercial mobile service" within the parameters established by Congress.^{4/} As the comments show, Congress intended that the Commission establish a broad definition of CMRS. When it amended Section 332 Congress also created a statutory definition critical to this debate. Mobile services was defined as including not only cellular and other traditional mobile services, but also all personal communications service ("PCS") licensees and licensed services springing from

^{4/} 47 U.S.C. § 332(d)(1).

successor proceedings.^{5/} Vanguard agrees with AT&T and others that convincingly demonstrate the specific inclusion of PCS in the statutory definition of commercial mobile service plainly reflects Congress' intent for *all* PCS-type services, regardless of whether they are primarily fixed or mobile, to be considered CMRS and therefore subject to exclusive Commission regulation.^{6/} Further, as Congress mandated regulatory parity for all CMRS, the Commission is obligated to assert the same broad authority over cellular and advanced SMR service that Congress required for PCS.

Congress' thinking was plain: it intended for the Commission to assert exclusive authority over all manner of commercial wireless services so that CMRS operators could offer advanced new services, some of which might challenge the current incumbent LEC monopoly over residential telephone customers. Indeed, Congress specifically wanted CMRS providers to offer telecommunication services to subscribers outside of the states' substantive regulatory purview. The legislative history of Section 332(c)(3)(A) confirms this:

the Commission should permit the States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, *it is not the intention of the conferees that States should be permitted to regulate these competitive services simply because they employ radio as a transmission means.*^{7/}

^{5/} 47 U.S.C. § 153(27).

^{6/} See AT&T Comments at 7-8. See also Motorola Comments at 7-8; The Personal Communications Industry Association at 10-11; The Cellular Telecommunications Industry Association Comments at 7-8.

^{7/} H. Conf. Rep. No. 213 103d Cong., 1st Sess. 493 (1993) (emphasis added). See also Nextel Comments at 5-6; Omnipoint Corporation Comments at 13; Rural Telecommunications Group Comments at 9.

NARUC's argument that Congressional awareness of traditional state substantive regulation of Basic Exchange Telephone Radio Service ("BETRS") "buttress[es] the requirement for a narrow reading of FCC 'CMRS' jurisdiction authority" thus falls flat.^{8/} First, Congress gave the Commission the sole authority to determine what services are and are not CMRS, and the Commission, not Congress, determined that BETRS would remain subject to the states' authority.^{9/} Further, as the Conference Report definitively confirms, when Congress passed the 1993 Budget Act it not only considered the possibility of fixed CMRS, it specifically determined that fixed CMRS used to provide basic local telephone service should not be subject to state regulation if the CMRS market is competitive. More recently when Congress passed the 1996 Act it was aware of both BETRS and of CMRS proposals to offer "fixed" services. There was no amendment of the Commission's authority over CMRS services.

II. EXCLUSIVE FCC JURISDICTION IS IN THE PUBLIC INTEREST.

Numerous commenters detail the harms that will result if the Commission declines to assert the broad substantive jurisdiction over CMRS that Congress intended. As Motorola states, "[w]ithout consistent, federal regulation of fixed, mobile, and integrated CMRS offerings, the public interest benefits the Commission hopes to attain by allowing flexible use of CMRS spectrum are unlikely to be achieved. The prospect of having to comply with the regulatory requirements of numerous different states, or with uncertain and potentially inconsistent federal

^{8/} NARUC Comments at 4-7.

^{9/} As the U S West Comments point out, the Senate initially proposed to exclude fixed services from the definition of mobile services, but the House definition ultimately prevailed. U S West Comments at 5.

rules, will act as a strong deterrent to the offering of fixed wireless services."^{10/} Further, adoption of the "case-by-case analysis" of appropriate regulatory jurisdiction the Commission proposes^{11/} will, as AirTouch and others note, "discourage the rapid development of new service offerings and hamper CMRS providers' abilities to alter their services to meet dynamic and rapidly evolving market demands."^{12/}

The Commission must also reject incumbent LEC and state claims that CMRS providers be saddled with incumbent LEC regulation in the name of "regulatory parity." The National Telephone Cooperative Association ("NTCA") argues, for example, that preempting state regulation of CMRS providers will "create asymmetrical regulation" because CMRS providers will not be subject to the same regulatory requirements as incumbent LECs.^{13/} Pacific Telesis Group and Bell Atlantic - NYNEX also claim that CMRS providers should be regulated as local exchange carriers when they act as "substitutes for wireline local exchange services."^{14/} These parties fail to recognize that the 1996 Act directly speaks to this issue and states that all competitive telecommunications carriers, CMRS providers and wireline providers alike, have

^{10/} Motorola Comments at 4.

^{11/} Notice at ¶ 53.

^{12/} AirTouch Comments at 7. *See also* Sprint Spectrum, L.P. Comments at 2; Nextel Comments at 8-9.

^{13/} NTCA Comments at 3-4. *See also* Public Utilities Commission of Ohio Comments at 4 (saying that the continued preemption of state CMRS regulation would "have the effect of favoring fixed wireless loop services in the establishment of the competitive local market.")

^{14/} Pacific Telesis Group Comments at 2-3; Bell Atlantic - NYNEX Comments at 2-3.

lightened regulatory obligations as compared to incumbent LECs.^{15/} The regulatory parity Congress created for CMRS is contained in the 1993 Budget Act.^{16/} It is difficult to see how the cause of local competition would be advanced if, contrary to the statute, CMRS providers are immediately weighted down with the same regulations that states have deemed appropriate for monopoly LECs.^{17/} Indeed, the parties that argue regulatory parity "requires" CMRS regulation as LECs now, absent a state-by-state Section 332 determination on CMRS replacing the incumbent LEC, have an argument with the statute, not with the Commission.

No commenter demonstrates any public interest benefit in either allowing state regulation of fixed CMRS or in requiring a case-by-case analysis of CMRS offerings.^{18/} Congress preempted state regulation of all CMRS, allowing it only when the Commission makes the determination a state has demonstrated under Section 332(c)(3)(A) that CMRS has become a

^{15/} See, e.g., 47 U.S.C. § 251 (differentiating between the interconnection obligations of "telecommunications carriers," "all local exchange carriers," and "incumbent local exchange carriers.")

^{16/} Congress recognized wireless has unique national competitive potential and worked to foster that potential with specific protections.

^{17/} The Commission recently determined in the *Local Competition Order* that CMRS providers should not be classified as LECs. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, CC Docket No. 96-98, CC Docket No. 95-185, FCC 96-325 (released August 8, 1996) (the "*Local Competition Order*") at ¶ 1004. Further, the Commission acknowledged in the *Local Competition Order* that "the determination as to whether CMRS providers should be defined as LECs is within the Commission's sole discretion. . . ." *Id.*

^{18/} The New York PSC even asks the Commission to establish a presumption that a CMRS provider is *not* providing mobile service, thus allowing the states to regulate CMRS providers until they make "an affirmative showing that the service being provided constitutes CMRS, as intended by the 1934 Act." New York State Department of Public Service Comments at 3. New York does not explain why such a radical departure from the 1993 Budget Act's preemption of state regulations and the current regulatory scheme is warranted.

replacement for landline service in a substantial portion of a particular state. Vanguard agrees with the comments of other CMRS providers that when the Section 332(c)(3)(A) test is met a state may regulate CMRS providers to the same extent as states may currently regulate competitive LECs.^{19/} No party, however, presents convincing support for a claim that the states should have jurisdiction over fixed CMRS prior to a state-specific Section 332(c)(3)(A) finding.^{20/}

In 1993, Congress determined that the consumer interest would not be harmed by deregulated telecommunications providers if those providers do not have market power, and the 1996 Act continues this deregulatory thrust. Absent a finding that CMRS providers have market power in the provision of "fixed" services there is no public interest benefit in regulating those providers as LECs, and if a CMRS provider has market power, a state can ask the Commission for permission to regulate. The time for regulatory parity with incumbent LECs will be if and when a CMRS provider obtains the same market status as the incumbent LEC. Then, and only then, is similar state regulation appropriate.

The Commission must put a stop to the continued debate on whether it or the states can (or should) regulate "fixed" CMRS. Congress intended that the Commission, and not the states,

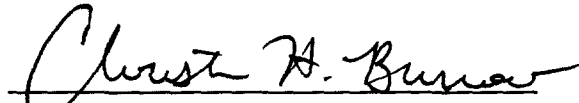
^{19/} See, e.g., AT&T Comments at 3-6; AirTouch Comments at 8-9; Omnipoint Corporation Comments at 12-14.

^{20/} NTCA's claim that the Section 332(c)(3) state petition process should not be used to determine when the states can regulate CMRS because it is "administratively cumbersome and costly" must be rejected out of hand. NTCA Comments at 4.

have jurisdiction over fixed, mobile and mixed CMRS, and the Commission should make plain its authority as part of this proceeding.

Respectfully submitted,

VANGUARD CELLULAR SYSTEMS, INC

A handwritten signature in cursive script, appearing to read "Christina H. Burrow", written over a horizontal line.

Raymond G. Bender
Laura H. Phillips
Christina H. Burrow

Its Attorneys

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

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